Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

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INTRODUCTION AND EXECUTIVE SUMMARY

This Commission has already committed to establishing a "minimal regulatory environment" for broadband based on a "*functional approach*" that strives to be "*consistent . . . across platforms*" and avoids "embed[ding] particular technologies."[1] "The time now is for action,"[2] not just for broadband Internet access services, but for all broadband information services.

The proper course of action, moreover, is clear. It was established less then two months ago when this Commission issued the *Cable Broadband Declaratory Ruling*.[3] The Commission there concluded that the correct legal and policy result was to grant broadband providers the freedom to structure their broadband services in whatever way best responds to the market.

In particular, the Commission left the unquestioned leaders in the broadband mass market – cable providers – free to design their broadband Internet access services and structure their relationships with independent ISPs in whatever manner they determined would best meet market demands. Under the Commission's ruling, cable broadband Internet access is regulated only under Title I and is not subject to *Computer Inquiry* requirements; thus, cable companies can offer customers a bundled Internet access service without creating a separate wholesale telecommunications service offering. Moreover, cable companies and individual ISPs can negotiate the particular access arrangement the private parties jointly determine to be most

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[1] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, ¶¶ 4-7 (rel. Feb. 15, 2002) ("*NPRM*") (emphasis added).
[2] *Id.*, separate statement of Chairman Michael K. Powell.
[3] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, CC Docket Nos. 00-185, 02-52, FCC 02-77 (rel. Mar. 15, 2002) ("*Cable Broadband Declaratory Ruling and NPRM*" or "*Cable Broadband Declaratory Ruling*").

advantageous. Cable providers do not have to engineer their networks to make a stand-alone telecommunications service available to ISPs, and they are not subject to any of the tariffing or other obligations in Title II. Indeed, the Commission not only concluded that the *Computer Inquiry* service unbundling rules should be waived in their entirety as to cable broadband Internet access services – in order to avoid the "radical surgery" that would be required for cable providers to "extract" a telecommunications service from their integrated information service – but also tentatively determined that it would forbear from applying *all* of Title II to those services.[4] By regulating cable broadband Internet access service under Title I instead of Title II, the Commission properly gave itself the flexibility to allow market forces, not regulation, to shape broadband offerings, while at the same time retaining jurisdiction to intercede at some later point if necessary to protect consumers.

The Commission is following this path for cable providers because it rightly believes that the market, not regulators, can best determine the network design and service arrangements that will lead to the greatest consumer benefit at the lowest cost. The Commission thus declined to extend to cable operators service unbundling obligations that would mandate direct end user access to multiple ISPs, *not* because there is some technical barrier to imposing such duties – there is no such barrier – but rather because that was the best way to ensure that consumers quickly reap the enormous potential benefits of broadband technology. As the Commission explained, the broadband market "is still in its early stages, supply and demand are still evolving, and several rival networks providing residential high-speed Internet access are still developing."[5] In that circumstance, "*enforcement of Title II provisions and common carrier regulation is not*

[4] *Id.* ¶¶ 43, 95.
[5] *Id.* ¶ 95.

necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory."[6]

Having made this decision, the Commission must now give the same regulatory freedom to wireline broadband providers – the secondary market players – that it has already given to the market leaders.[7] As SBC explains below, Congress and the courts have repeatedly made clear that this Commission is legally required to treat like services alike.

That result, moreover, is commanded not only by black-letter law, but also by sound policy. Permitting wireline broadband providers the same market freedom as cable operators is the only rational result, and the only one that will lead to the explosion in broadband access that the Commission has identified as its single most important policy goal. *See NPRM* ¶ 3. By contrast, it is simply impossible for the Commission to create the "*comprehensive* and *consistent* national broadband policy" that it correctly understands to be a fundamental prerequisite for broadband investment and deployment if some facilities-based broadband providers are subject to burdensome regulatory restraints, while others are not. *Id.* ¶ 8 (emphasis added). Such a regime is anything but comprehensive or consistent. It skews market results, and it strangles incentives for investment.

Such an asymmetrical regulatory regime is particularly indefensible, moreover, because it subjects the *small* players, and not the large players, to burdensome requirements. If the broadband mass-market is sufficiently competitive that the market leaders (with nearly 70% market share) should have the freedom to structure their services and arrangements with end users and ISPs as they see fit, that must be true for secondary providers as well. Existing

[6] *Id.* (emphasis added).
[7] Consistent with the *NPRM*, SBC uses the term "wireline" broadband service to refer to broadband services provided via the telephone network. *See NPRM* ¶ 1 n.1.

technology allows both cable broadband and wireline broadband networks to provide multiple ISP access. Moreover, the costs and operational and network management issues are similar for both platforms. Thus, the issue of whether and what type of ISP access requirements should apply to broadband services is not one of technical or operational feasibility.

To align its regulation of wireline broadband providers with that of their intermodal competitors, the Commission must take at least the following steps here:

First, the Commission must adhere to its binding conclusion in the *Cable Broadband Declaratory Ruling* – as well as the tentative conclusion in the *NPRM* in this docket – that wireline broadband Internet access service is an "information service," not a "telecommunications service."

Second, and again as with cable modem providers, the Commission must establish that a wireline provider has no obligation to "peel off" the telecommunications component of bundled broadband Internet access service and make it available as a wholesale telecommunications service subject to Title II. Rather, the Commission should determine that wireline broadband Internet access service, like analogous cable broadband Internet access service, falls under Title I. The Commission should thus expressly decline to extend the *Computer Inquiry* service unbundling rules in the broadband context.[8] As the Commission has recognized, the *Computer Inquiry* rules are grounded in market conditions, technological limitations, and legal rules that do not apply to broadband. In particular, the "core assumption" of the *Computer Inquiry* regime "was that the telephone network is the primary, if not exclusive, means through which

[8] *See, e.g.,* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer* II), 77 F.C.C.2d 384 (1980) ("*Computer II*"); Report and Order, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) ("*Computer III*"). In this pleading, SBC will refer to these obligations as the "*Computer Inquiry*" requirements.

information service providers can obtain access to customers."[9] That assumption is plainly no longer valid in the mass market for broadband Internet access – a market in which various technology platforms (*e.g*., cable, wireline, wireless, and satellite) are competing for the same customers.

There is no need to create a new regulatory regime to replace the *Computer Inquiry* requirements. Wireline broadband providers have significant market-based incentives to continue to provide access to unaffiliated ISPs. SBC does business with hundreds of ISPs today, and it has no desire to discontinue those business relationships. It is precisely for that reason that SBC, on its own, has negotiated a Memorandum of Understanding with the US Internet Industry Association ("USIIA")– an association of nearly 300 diverse Internet providers, including ISPs – that commits SBC to negotiate and make available commercial agreements with ISPs for broadband Internet access in a deregulated environment.

As this Memorandum of Understanding shows, ISPs as well will benefit from the flexibility afforded by market-based solutions. Without the shackles of regulation, SBC – like cable providers – will be free to design its broadband services and structure its relationships with ISPs in creative ways, including joint provisioning and revenue sharing, that will better meet market demand.

If, however, the Commission determines that some regulation is necessary, that regulation should draw, as much as possible, on market forces. The Commission should not mandate a particular form of ISP access, such as requiring broadband service providers to "peel off" stand-alone transmission capacity for non-affiliated ISPs. Rather, it should simply require that broadband Internet access providers negotiate commercial agreements with non-affiliated

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[9] *NPRM* ¶ 36.

ISPs, without specifying the form of the access or the technical configuration of the service, and while preserving the ability of private parties to enter into creative arrangements that allow for differentiation in business relationships.

Any such rules, moreover, should apply *equally* to *all* broadband providers, regardless of the platform that they use. Certainly, there is no rational basis upon which the Commission could conclude that wireline providers, but not cable operators, should be subject to access requirements. After all, if the market is sufficiently competitive that consumers will have a meaningful choice of ISPs when subscribing to cable modem service, the same must be true for secondary players as well. Indeed, it would make little sense to mandate that ISPs have access to the broadband facilities that serve less than 30% of the market, while granting them no access to facilities serving the other 70%. Nor would it make sense for the Commission to justify leaving cable modem service free of any ISP access obligation by forcing wireline companies to serve as the ISP provider of last resort.

Third, the Commission should make clear that a wireline provider is not required artificially to structure *any* of its broadband information services to create a separate telecommunications service offering. Broadband networks are rapidly evolving to the point where they are capable of manipulating and processing data contained within individual packets, which creates the potential for offering customers many new and exciting services. There is no legal or policy justification for creating a distinction between broadband Internet access and other packet-based broadband information services that involve the same fusion of telecommunications with content and information service functionalities. Indeed, the application of *Computer Inquiry* service unbundling requirements to other packet-based broadband information services could prevent wireline providers from offering such services altogether because of their inability practicably to separate a pure transmission component from the information service component of such offerings.

Fourth, the Commission should establish that the 1996 Act's resale obligations do not apply to wireline broadband information services and that the unbundling obligations do not apply to facilities used exclusively by incumbent or competitive LECs to provide such services. Because broadband information services are not telecommunications services (much less retail telecommunications services), the 1996 Act's resale requirements plainly do not apply. Moreover, since the Act defines networks elements as facilities "used in providing a telecommunications service," and a broadband information service is not such a "telecommunications service," the facilities used exclusively to provide such a service (*e.g.*, packet equipment and associated transport, high-frequency portion of the loop) is not subject to section 251(c) unbundling. By the same token, since requesting carriers are permitted to use network elements for the provision of "a telecommunications service," they may not obtain access to a network element for the sole purpose of providing a broadband information service.

Fifth, the Commission must ensure that LEC investment incentives are not undermined by a patchwork of inconsistent state regulation. It does no good for this Commission to deregulate wireline broadband services if the states step in and undo the Commission's work. In fact, because of the uncertainty inherent in patchwork regulation, that would be significantly worse than the status quo. Moreover, this Commission is the only regulatory body that has the authority to regulate all technology platforms and that can establish a consistent regulatory framework for all broadband services. The Commission should accordingly exercise its clear authority to preempt state regulation that would undermine federal policy as to these interstate services.

Finally, the Commission's resolution of other issues raised by the *NPRM* – including those related to universal service, CPNI, and national security – should be consistent with the principles of minimal, symmetrical regulation to which the Commission has properly committed. We discuss those issues in detail below.

DISCUSSION

I. ALL BROADBAND SERVICES SHOULD EXIST IN A MINIMAL REGULATORY ENVIRONMENT.

The issues in this proceeding are necessarily linked with those in the other dockets that the Commission has established in order to create a national broadband policy. The Commission's recent *Declaratory Ruling and NPRM* in the *Cable Broadband* proceeding – a proceeding that the Commission has correctly characterized as the "functional equivalent" of this one (*NPRM* ¶ 9) – is especially relevant here.[10]

In the *Cable Broadband* order, the Commission found that cable providers should be free to design their broadband Internet access services and structure their relationships with ISPs through private contracts and negotiation. The Commission noted that in the dynamic, evolving broadband market, competition should drive business relationships and service offerings. *See Cable Broadband Declaratory Ruling and NPRM* ¶¶ 43, 95. Consistent with this policy – a policy grounded in the market-based goals of the 1996 Act – the Commission declined to apply *Computer Inquiry* service unbundling rules to cable broadband Internet access services and tentatively held that it should forbear from applying any Title II requirements to such services. *See id.*

[10] The Commission's *Triennial Review* and *Wireline Broadband Non-Dominance* proceedings are also directly relevant. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, *et al.*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *et al.*

The Commission thus determined that broadband Internet access services provided by cable operators would be regulated, if at all, pursuant to Title I of the Communications Act. *See Cable Broadband NPRM* ¶ 95. Under Title I – which, significantly, provides a technology-neutral vehicle for the Commission to apply the *same* regulatory rules to *all* broadband platforms – the Commission has the flexibility to allow the nascent and competitive broadband market to develop free of regulatory distortion. The Commission's decision to act under Title I in the cable context means that facilities-based cable providers will not be dissuaded by onerous service unbundling requirements or other regulatory obstacles from investing the billions of dollars necessary for broadband to fulfill its enormous potential. Put differently, the use of Title I was understood to be strongly pro-competitive because, as Chairman Powell recently explained, what is needed in the broadband context is "a regulatory environment that provides the incentives necessary to deploy new services on the part of the private sector. The more onerous the regulatory environment, the costs of deployment become higher and riskier and more difficult . . . . [W]e are fearful of intervening prematurely in a way that frustrates experimentation and creativity."[11] At the same time, however, under Title I, the Commission retains jurisdiction to protect the public interest should that become necessary at some later point in broadband's development. *See id.* ¶¶ 75-79. For all these reasons, as the Commission properly understood, Title I is the appropriate regulatory instrument for cable broadband Internet access service.

The Commission's determination to grant Title I treatment to cable broadband Internet access service, as well as other aspects of the *Cable Broadband* decision that SBC discusses below, should drive its decision here as well. Cable and wireline broadband – along with satellite and wireless – compete directly in a single, highly competitive market for broadband

Internet access. As the Commission has explained – and as SBC has demonstrated at length in its filings in the Commission's *Wireline Broadband Non-Dominance* proceeding (CC Docket No. 01-337) – "the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[12]

The Commission has further recognized that cable broadband Internet access is by far the "most widely subscribed to technology" with approximately 68% of the residential market. *Cable Broadband Declaratory Ruling* ¶ 9. One industry analyst put the same point more bluntly: "[T]he cable industry is clobbering the telephone companies in the race to bring high-speed Internet connections to American homes."[13]

Because there are multiple facilities-based broadband platforms, the Commission itself has properly stressed that it must adopt a "functional approach" that focuses on the "nature of the service provided to consumers," not the technology used, and must strive to "develop an analytical framework that is consistent, to the extent possible, across multiple platforms." *NPRM* ¶¶ 6-7. As Chairman Powell has long emphasized, the Commission must move to "some degree of *less* regulation" in the broadband market that would be "*not so technology centric*."[14] "We

[11] Michael K. Powell, Chairman, FCC, Remarks at the ITU Second Global Symposium for Regulators, Geneva, Switzerland (Dec. 4, 2001).
[12] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001) ("*Wireline Broadband Non-Dominance NPRM*").
[13] Jonathan R. Laing, *Get Wired: Why Cable Will Beat the Bells in the Race to Wire Your Home*, Barron's, Aug. 20, 2001.
[14] *Cable Bureau Suggests Regulatory Forbearance for New Services*, Communications Daily, Feb. 23, 2001, at 2 (emphasis added).

need these things harmonized," he said.[15] "Otherwise, we're penalizing a competitive technology simply because of its legacy."[16]

Indeed, the Commission has an affirmative legal obligation to adopt a functional broadband approach that treats like services alike. Congress made plain in section 706 of the 1996 Act that it was charging the Commission to "encourag[e]" the deployment of "advanced telecommunications capability" generally, not to favor any particular technology used to deliver that capability. Congress expressly defined the term "advanced telecommunications capability" to include "high-speed, broadband telecommunications capability" "*without regard to any transmission media or technology.*" 47 U.S.C. §157 note (emphasis added). The Commission's duty here is thus to "remove barriers to infrastructure investment" for *all* broadband technologies; it would be inconsistent with the Act to advance some technologies at the expense of others.

Moreover, consistent with that express legislative language, the drafting history of the 1996 Act makes plain that Congress tasked this Commission with eliminating differential treatment of competing technologies. As the 1996 Act's lead sponsor explained, Congress specifically concluded that a scheme of "regulatory apartheid" "no longer makes sense." 141 Cong. Rec. S7885 (daily ed. June 7, 1995) (statement of Sen. Pressler). That is the case because, as the same Senator properly explained, "[a] movie, phone call, letter, or magazine article may be sent digitally via phone line, coaxial cable, fiber-optic cable, microwave, satellite, [or] the broadcast air." *Id.*; *see also id.* at S8067 (daily ed. June 9, 1995) (statement of Sen. Leahy) ("We need to update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer, and broadcast services . . . ."); 141 Cong. Rec. H8282 (daily ed.

[15] *Id.* (emphasis added).

Aug. 2, 1995) (statement of Rep. Bliley); 142 Cong. Rec. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Gilchrest). These repeated statements leave little doubt that Congress understood that the Commission's duty was to harmonize regulation of different facilities-based broadband offerings that compete against each other.

In other contexts as well, both Congress and the courts have repeatedly reminded the Commission of its duty to apply a functional approach that treats like services alike, and not to make distinctions based on the identity of the provider or the technology used. For instance, when the Commission sought to regulate dark fiber provision on a common carrier basis, not because of the characteristics of the service offering, but simply because of the identity of the provider, the D.C. Circuit overturned its decision. As the Court explained, "[w]hether any entity in a given case is to be considered a common carrier" turns not on its historical status, but rather "on the particular practice under surveillance." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).[17] Similarly, after the Commission refused to place Nextel's "private" wireless service on the same regulatory footing as functionally equivalent "public" service, Congress enacted legislation to "achieve regulatory parity among services that are substantially similar," and to ensure that "equivalent mobile services are regulated in the same manner."[18] And when the Commission still refused to regulate PCS in the same manner as

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[16] *Id.*

[17] *See also* Order on Remand, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 571, 574 ¶ 10 (2000) (same); Memorandum Opinion and Order on Reconsideration, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3035, 3060-61, ¶ 179 (1987) ("*Computer III Reconsideration Order*") ("The courts and this Commission have held consistently that a firm's status as a common carrier is defined in terms of the manner in which it offers particular services. Thus, firms like the BOCs are not common carriers with respect to each communication service they offer, simply because they provide some services on a common carrier basis.").

[18] H.R. Rep. No. 103-111, at 259-60 (1993) (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)).

cellular service, the Sixth Circuit overruled it. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

Even if the Commission had some discretion on this issue, the only reasonable result is to provide at least as much regulatory flexibility to wireline broadband providers as it has for cable broadband providers. At the most basic level, a fundamental prerequisite for a consistent national broadband policy grounded in minimal regulation is that secondary market participants enjoy the same freedoms as the market leader. It makes no economic sense to saddle secondary market players with regulatory burdens that limit their network and service design decisions and require them to share their investments and innovations with their competitors, while the market leader remains unconstrained. Such a policy only hampers the ability of upstarts to gain ground on the market leader, and it chills their incentives to invest in new technologies, including the packet technology that is fueling broadband.

The end result, of course, is significant consumer harm. As this Commission has explained, "enormous new investment and innovation will be required if we are to realize the full promise of broadband deployment."[19] One analyst has estimated that "modernizing our wireline access infrastructure will likely cost over $200 billion from start to finish."[20] Without these investments, the current wireline broadband Internet access option, DSL, will remain bounded by the limits of the legacy copper network, and be unable to keep pace with consumer demand for greater digital capacity and speed.[21]

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[19] *Wireline Broadband Non-Dominance NPRM,* 16 FCC Rcd at 22747, ¶ 4.
[20] Douglas Ashton, Bear Stearns and Co., prepared witness testimony before the House Energy and Commerce Committee, Washington, D.C. (Apr. 25, 2001).
[21] The Chief of the Commission's Cable Service Bureau recently observed that the "[c]urrent generation 'broadband' networks cannot support . . . killer apps, the predecessors of which are staring us right in the face." Such applications will require "next generation of broadband network – one that presumably will be symmetrical, or nearly so, and capable of delivering

Moreover, LECs will continue to be wary about investing in new generations of broadband technology that would require further investment, such as broadband passive optical network ("BPON") technology, that could be subject to regulatory burdens. If those investments are not made, consumers will be deprived of a significant broadband choice and cable providers' current dominance will be cemented. *See* Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable And Timely Fashion*, 15 FCC Rcd 20913, 21004, ¶ 246 (2000) ("*Second Advanced Services Report*") ("[C]ompetition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability.").

Nor does such an asymmetrical policy even ensure meaningful access for ISPs. Because fewer than one-third of all broadband Internet access is provided over wireline facilities, requirements that LECs – but not cable modem providers – offer them access serve little purpose. Put differently, if the Commission believes that market-based solutions involving "negotiations and commercial decisions" (*Cable Broadband Declaratory Ruling* ¶ 30) are sufficient to ensure consumers a choice of ISPs for the market-leading broadband technology, *a fortiori* the market provides consumers with sufficient protection for secondary technologies, which plainly have less ability to limit consumer choice or otherwise to act anti-competitively.

Finally, just as with cable modem providers, there are significant costs and difficulties associated with LECs artificially structuring their broadband information services to create a separate telecommunications service offering. In the *Cable*

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perhaps ten megabits per second." W. Kenneth Ferree, Chief, Cable Services Bureau, FCC, "How *Do* You Build the Information Superhighway?," Remarks at the Broadband Outlook 2002 Conference (Jan. 23, 2002).

Broadband Declaratory Ruling, the Commission noted that Internet connectivity in a multiple ISP environment may require the development of certain additional facilities and systems, depending on the chosen technical solution, and necessitate operational and customer service functions that require the development of operational support systems in order to properly provision, bill, and manage subscriber accounts.[22] The Commission also noted the potential cost of regulation, including opportunities for regulatory arbitrage, the imposition of long-term costs on the market, and the potential negative impact on the discovery of network designs, content, applications, and new business models.[23]

These issues are not unique to cable modem service providers. They are equally applicable to wireline providers, and the Commission must perform the same cost-benefit analysis across competing platforms in assessing the need for regulation. In order to maximize the deployment of broadband services, the Commission should not mandate the type of rigid service unbundling requirement established in the *Computer Inquiry* regime. Instead, consistent with its desire for a minimal regulatory environment for broadband services, the Commission should give all broadband service providers the freedom to enter into a wide variety of commercial arrangements with ISPs that are mutually beneficial.

[22] *Cable Broadband Declaratory Ruling and NPRM* ¶ 19.
[23] *Id.* ¶ 90.

II. THE COMMISSION SHOULD TAKE A SERIES OF SPECIFIC STEPS TO ENSURE MINIMAL REGULATION OF WIRELINE BROADBAND SERVICES.

A. The Commission Should Adopt Its Tentative Conclusion that Wireline Broadband Internet Access Is an Information Service.

The most basic requirement of adhering to the Commission's "functional approach" to broadband is to establish that wireline broadband Internet access service, like functionally equivalent cable broadband service, constitutes an "information service," not a "telecommunications service," under the Communications Act. Even before the Commission issued its *Cable Broadband Declaratory Ruling*, it tentatively concluded in the *NPRM* in this proceeding that "the provision of wireline broadband Internet access service is an information service." *NPRM* ¶ 17. In the wake of the *Cable Broadband Declaratory Ruling*, that tentative conclusion must be considered definitive.

The Commission squarely held in the *Cable Broadband* decision that an Internet access service that "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications . . . is an information service." *Cable Broadband Declaratory Ruling* ¶ 38. Because, as the Commission expressly noted in that decision, "none" of the relevant statutory definitions "rests on the particular types of facilities used," that analysis applies directly to this case. *Id.* ¶ 35.

In particular, just like cable modem service, wireline broadband providers offer "a single, integrated service that enables the subscriber to utilize Internet access service through" the provider's facilities. *Id.* ¶ 38. Wireline broadband subscribers receive, among other things, e-mail, newsgroups, the ability to create a web page, and access to the domain name system, which is a "general purpose information processing and retrieval capability that facilitates the use of the

Internet in many ways." *Id.* ¶ 37. Accordingly, as in the cable context, a wireline broadband Internet access subscriber receives a single service that "combines the transmission of data with computer processing, information provision, and computer interactivity." *Id.* ¶ 38. Wireline broadband Internet access thus plainly meets the statutory definition of an information service – "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

For the same reasons as in the cable modem context, wireline broadband Internet access service *uses* "telecommunications"; it does not contain a separate "telecommunications service." The transmission capabilities offered to customers are "part and parcel" of the product offered to end users and "integral" to the capabilities of Internet access. *Cable Broadband Declaratory Ruling* ¶ 39. As the Commission correctly explained in the *NPRM*, a "provider offering [wireline broadband Internet access] over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services." *NPRM* ¶ 25.

Moreover, the *Cable Broadband Declaratory Ruling* establishes that Internet access is an information service even when offered by providers that, like ILECs, own at least some of the transmission facilities used to provide broadband service. *See id.* ¶ 14 (suggesting that this question has not been fully resolved previously). Cable providers, like ILECs, generally own some, if not all, of the facilities over which they provide Internet access; nevertheless, the Commission squarely determined that they offer an information service with a telecommunications component, not a separate telecommunications service. *See also* Order on Remand, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the*

Communications Act of 1934, as amended, 16 FCC Rcd 9751, 9759, ¶ 17 (2001); Report To Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11521, ¶ 41 (1998) ("*Report To Congress*").

B. The Commission Should Eliminate the *Computer Inquiry* Service Unbundling Requirements for Wireline Broadband Information Services.

While a determination that wireline broadband Internet access services are information services – not common carrier telecommunications services – is a necessary first step here, that step by itself will not remotely ensure that wireline broadband services exists in a "minimal regulatory environment" or that regulation is "consistent, to the extent possible, across multiple platforms." *NPRM* ¶¶ 5-6. That is because, under the *Computer Inquiry* regime, wireline providers– but not cable companies – must offer the telecommunications component of their broadband information services as stand-alone Title II telecommunications services. *See NPRM* ¶ 42 ("[A]s a result of the requirements in *Computer II* and *Computer III*, BOCs that provide information services are required to offer the transmission component of the information service separately pursuant to tariff, and must also acquire such transmission for their own information service offerings pursuant to tariff.").[24]

It is time — indeed past time — for the Commission to repeal this outdated requirement, at least as it applies to broadband information services. As shown below, the application of

[24] The Commission has indicated that it understands section 251(g) to preserve "open access" requirements that require nondiscriminatory access for affiliated and non-affiliated ISPs that were applicable to "information access" under the Modification of Final Judgment. *See* First Report and Order, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22024 n.621 (1996). For the same reasons discussed in the text as to the *Computer Inquiry* service unbundling requirements, those dated requirements should be held to be inappropriate in the broadband context. Thus, the Commission should make clear in this proceeding that it is exercising its authority under section 251(g) to eliminate any pre-existing open access or nondiscrimination requirements as applied to broadband information services.

Computer Inquiry service unbundling requirements to wireline broadband services is not only unnecessary, but also harmful.

In fact, the Commission reached that precise conclusion in the *Cable Broadband Declaratory Ruling*. Although cable operators serve two-thirds of the broadband Internet access market, the Commission determined that they should not be required to comply with the *Computer Inquiry* service unbundling requirements. Instead, the Commission found that cable operators should retain complete freedom to structure their cable broadband Internet access services in the most efficient way possible and to negotiate with individual ISPs the terms of access to their broadband networks. Therefore, cable operators, unlike wireline providers, need not engineer these networks so as to enable the provision of a Title II telecommunications service offering for unaffiliated ISPs, nor must they offer any other form of access to these facilities. Rather, the Commission has determined that the terms of such access should continue to "evolve through negotiations and commercial decisions." *Cable Broadband Declaratory Ruling* ¶ 30.

Having reached this conclusion with respect to the market leader in the broadband Internet access market, it would make no sense for the Commission to reach a different conclusion with respect to the *secondary* market players. Thus, consistent with its decision in the *Cable Broadband Declaratory Ruling,* the Commission should determine that those rules do not apply to wireline broadband Internet access services. Moreover, as shown below, for virtually the same reasons, it should conclude that such requirements do not apply to *any* wireline broadband information service.

1. *Computer Inquiry* Unbundling Requirements Are Not Necessary in the Context of Wireline Broadband Information Services.

As the Commission repeatedly acknowledged in the *NPRM*, the *Computer Inquiry*'s service unbundling obligations are based on legal and factual premises that do not apply to wireline broadband services. When that proceeding commenced, a single carrier provided local service in almost every community under an exclusive franchise. Accordingly, enhanced service providers had no choice but to use the wireline network to reach their customers. *See Computer II*, 77 F.C.C.2d at 475, ¶ 231 ("enhanced services are dependent upon the common carrier offering of basic services").[25] As the *NPRM* cogently explains, "the *core assumption* underlying the *Computer Inquiries was that the telephone network is the primary, if not exclusive, means through which information service providers can gain access to their customers*." *NPRM* ¶ 36 (emphasis added).

That assumption no longer holds true – certainly not with respect to incumbent LECs' wireline broadband networks. Unlike the circuit-switched wireline network of twenty years ago, the wireline broadband networks of today operate in a world in which "convergence" has led to

[25] *See also id.* at 474, ¶ 229-30 ("Requiring the subsidiary to acquire its transmission capacity from other sources pursuant to tariff provides a structural constraint on the potential for abuse of the parent's market power through controlling access to and use of the underlying transmission facilities in a discriminatory and anticompetitive manner. . . . The separate subsidiary for enhanced services and CPE also provides a structural mechanism for the separation of these carriers' regulated and nonregulated activities, thereby lessening the potential that the communications ratepayer will be subsidizing their unregulated ventures."); *id.* at 481, ¶ 250 ("The principle upon which we have relied in our consideration of the most appropriate corporate structure for GTE and AT&T in the provision of CPE and enhanced services is that a firm with a dominant market position – either in terms of a market position insulated from effective competition or as a result of effective control of facilities essential to the operation of its competitors, or both – must be prevented from exploiting that position by extracting supra-competitive profit from the customers of one service to price another service at below cost levels.").

significant competition. As the Commission recently observed, "the one-wire world for customer access appears no longer to be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services." *Wireline Broadband Non-Dominance NPRM*, 16 FCC Rcd at 22748, ¶ 5. Because of the significant "technological evolution" that has occurred over the past few years, "other network platforms" now compete to provide broadband service. *NPRM* ¶ 36. Indeed, as noted above, LECs are *secondary* players in the broadband Internet access market, and they lag far behind the market-leading cable companies.

The displacement of the local bottleneck for broadband Internet access eliminates the core basis on which the *Computer Inquiry* service unbundling requirements were premised. But that is not the only change that has taken place in the twenty years since those requirements were established. Regulatory changes, most notably price cap regulation, have eliminated any possibility that the Bell companies could shift the costs of their competitive broadband information services to regulated ratepayers. As the D.C. Circuit concluded in reviewing the Commission's decision adopting the price cap regime, price cap regulation "reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993).[26] The Ninth Circuit reached a similar conclusion in *People of the State of California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) ("*California III*"), where it held that the Commission's new cost accounting rules, coupled with the move to price cap regulation, has "significantly reduced" "the BOCs' incentive and ability to cross-subsidize." Finally, as a result of the 1996 Act, the BOCs no longer have purportedly captive ratepayers to whom they allegedly could pass on the costs associated with their broadband Internet access service. CLECs and wireless carriers offer competitive alternatives to BOC telephone service throughout the country, and they are rapidly taking market share from the BOCs.[27]

Indeed, if there is any danger of cross-subsidization here, it is posed by the dominant cable incumbents. Unlike ILECs, cable operators are not precluded from using revenues from their traditional lines of business – in this case multi-channel video programming distribution ("MVPD") – to subsidize their broadband services. And there can be little doubt that cable's entrenched MVPD position provides it with ample resources to do exactly that: as the Commission recently found – and as other sources confirm – cable's video rate hikes have consistently outpaced inflation, so much so that Senator McCain recently asked the General Accounting Office to initiate an investigation of these increases.[28] If the prospect of cross-subsidization is insufficient to impose *Computer Inquiry* requirements on cable – and the *Cable Broadband* order makes clear that it is – it necessarily follows that it is likewise insufficient to impose such requirements on ILECs.

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[26] The D.C. Circuit additionally recognized that state commissions set residential rates at or below cost, which additionally precludes cross-subsidization. *See id.* at 1581.

[27] *See* UNE Fact Report 2002, at I-5 to I-7, I-10, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*s, CC Docket Nos. 01-338, 96-98, 98-147 (FCC filed Apr. 5, 2002).

[28] *Sen. McCain Asks GAO To Review Rising Cable TV Rates*, The Wall Street Journal Online (Apr. 16, 2002) *at* http://online.wsj.com/article/0,,BT_CO_20020416_010433.djm,00.html (May 1, 2002); Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, FCC 02-107, ¶ 22 (rel. Apr. 4, 2002); *see* Dr. Mark Cooper, Consumer Federation of America, *The Failure of Intermodal Competition in Cable and Communications Markets* 15-18, *at* http://www.consumerfed.org/Intercomp.20020423 (Apr. 30, 2002).

Importantly, the *Computer Inquiry* service-unbundling requirements are unnecessary not only for broadband Internet access, but also for *any* packetized broadband information service. As SBC has shown in it filings in the *Wireline Broadband Non-Dominance* proceedings, incumbent LECs lack market power *both* in the provision of mass market broadband services (which today consists primarily, if not exclusively, of Internet access services) *and* in the provision of broadband services to larger business customers. Significantly, the *Cable Broadband Declaratory Ruling* recognized that cable operators are providing these other types of broadband services, such as Virtual Private Network services, to business customers. Yet the Commission declined even to consider, let alone impose, regulations on these services. *See Cable Broadband Declaratory Ruling* ¶ 31 n.129.

It is not just cable operators, though, that provide these services. CLECs and IXCs have deployed more than 1700 packet switches – 9500 according to AT&T[29] – and they are using these switches to dominate the larger business market for broadband services.[30] Thus, whereas AT&T, WorldCom, and Sprint control more than two thirds of the nationwide market for these services,[31] SBC has roughly 12 percent of this market (a figure that has not grown over the last three years). Incumbent LECs, moreover, have no first-mover advantage in this market, nor as secondary players in the market do they enjoy scale advantages. Rather, they entered with zero market share, and their market share has remained stagnant in recent years. As one analyst has noted, "[t]he Big 3 IXCs own the U.S. frame relay market, have scale economies and are best

[29] AT&T Comments at 50, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147 (FCC filed Apr. 5, 2002).
[30] UNE Fact Report 2002, at II-24, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*s, CC Docket Nos. 01-338, 96-98, 98-147 (FCC filed Apr. 5, 2002).
[31] *Id.*

positioned to influence users and move the market."[32] Even in comparison to CLECs, incumbents have no scale advantages. To the contrary, the Commission has found that "[i]ncumbent LECs and their competitors are both in the early stages of packet switch deployment, and thus face relatively similar utilization rates of their packet switching capacity It therefore does not appear that incumbent LECs possess significant economies of scale in their packet switches compared to the requesting carriers."[33]

Because the predicate underlying the *Computer Inquiry* unbundling requirement – the existence of bottleneck facilities – does not apply to wireline broadband services, this requirement no longer serves any useful purpose in the context of those services. That is true not only of wireline broadband Internet access services, but also of *any* wireline broadband information service.

2. *Computer Inquiry* Unbundling Requirements Impede Broadband Investment.

The *Computer Inquiry* requirements are not simply harmless historical artifacts as extended to broadband; they affirmatively impede competition and investment.

By requiring that broadband information services be deployed via architectures that permit the unbundling of a separate, stand-alone transmission service, these requirements artificially increase the costs of broadband deployment, while simultaneously constraining the ability of LECs to design these services in ways that maximize their utility to consumers. The Commission recognized these costs in the *Cable Broadband Declaratory Ruling*. It noted that

[32] *Id*. (citing Stratecast Partners, *ATM and Frame Relay Market Assessment*, Data/Internet Services Growth Strategies, Vol. II, No. 10, at 12 (Sept. 2001)).

[33] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3836, ¶ 308 (1999) ("*UNE Remand Order*"), *petitions for review pending*, *United States Telecom Ass'n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir.).

"[c]able operators have repeatedly stated that if local governments imposed multiple ISP access requirements, they would delay deployment of cable modem service and other services" and found that application of *Computer Inquiry* unbundling requirements to cable broadband services would "disserve" the goal of section 706. *Cable Broadband Declaratory Ruling* ¶ 47 & n.176. It further determined that "many, if not most, . . . cable operators would stop offering telephony if such an offering triggered" *Computer Inquiry* unbundling requirements, and it characterized the network changes necessary to comply with *Computer Inquiry* unbundling requirements as "radical surgery." *Id.* ¶ 43.

These costs are no less of a consideration for wireline broadband providers. Not only do the existing requirements limit the way wireline broadband providers may design and engineer their facilities; they also constrain the way such providers structure their relationships with ISPs. SBC wants to do business with independent ISPs, and it has business relationships with hundreds of independent ISPs. If allowed the same freedom as cable providers, SBC might well seek to enter into joint provisioning arrangements with independent ISPs to provide broadband Internet access, in much the way some cable providers are now doing. *See id.* ¶ 26. Under this type of arrangement, SBC and the ISP would be cooperating to provide a retail broadband Internet access service offering, and both parties would maintain a direct customer relationship with subscribers. *See id.* ¶ 52. SBC might also seek to negotiate private carriage arrangements that would be tailored to the unique circumstances of particular ISPs; these deals might involve revenue sharing and other mutually beneficial business arrangements. SBC might also seek to enter into network-to-network interface arrangements with ISPs that are technically more efficient than the current arrangements. Many of these arrangements are problematic under the rigid structure of the *Computer Inquiry* regime. Paradoxically, that regime limits the options of the secondary players in the broadband Internet access market.

Again, however, *Computer Inquiry* service unbundling requirements are not just a drag on the development of new and innovative ways of provisioning broadband Internet access services. They are also a drag – probably more so – on the development of other types of broadband information services. The capabilities of packet-based networks are being revolutionized. Increasingly, new technologies are being developed that integrate transmission with content and/or information service functionality. For example, technology will allow wireline broadband providers to offer new and innovative services by processing and manipulating information contained in individual packets, cells, or frames. These services would thus fuse transmission and computer processing functionalities in ways that make it difficult, if not impossible, to unbundle a pure transmission service. If the *Computer Inquiry* rules apply to such offerings, wireline broadband providers could effectively be precluded from offering these services altogether. Such a result would harm consumers and betray the Commission's obligation under section 706 to remove regulatory obstacles to broadband deployment.

Accordingly, by making plain that all wireline broadband information services will be regulated only under Title I, and not under the *Computer Inquiry* regime, the Commission will remove a significant hindrance to development and deployment of important new broadband technologies and applications. That course of action is particularly crucial in broadband, where technological change is occurring rapidly and certainty as to the treatment of new offerings is necessary for consumers to benefit from these advances.

3. The Commission Has Not Only the Authority, But Also the Obligation to Repeal the *Computer Inquiry* Requirements for Broadband Information Services.

From the inception of the *Computer Inquiry* regime, the Commission has recognized that it has the authority to alter or repeal its *Computer Inquiry* requirements in response to technological, legal, and market changes, and it has done so repeatedly in the past.[34] Consistent with this recognition and established precedent, the Commission should respond to the revolutionary changes taking place in the broadband market by repealing the *Computer Inquiry* requirements for all broadband information services, regardless of whether they are being offered by a cable operator or a wireline provider.

In fact, the Commission has a statutory obligation to take this deregulatory action. Section 706 mandates that the Commission must remove regulatory barriers to investment in advanced infrastructure. As shown above, the *Computer Inquiry* service unbundling requirements unnecessarily impede the deployment of broadband services. The Commission has a similar obligation under section 161(a)(3), which compels the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest." Moreover, there are other statutory requirements that compel the Commission to deregulate wireline broadband services to the same extent as cable broadband services. As the Commission

[34] *See* Memorandum Opinion and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 84 FCC 2d 50 (1980) ("*Computer II Reconsideration Order*") ("[W]e approach this with the view that our separation conditions will evolve over time as we gain more experience in this very complex area of communications regulation and as the marketplace continues to evolve."); *Computer II*, 77 FCC 2d at 430, ¶ 120 ("We are faced with the reality that technology and consumer demand have combined to so overrun the definitions and regulatory scheme of the *First Computer Inquiry*); *see also Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 202 (D.C. Cir. 1982) (describing

recognized in the *Cable Broadband Declaratory Ruling*, consistent with section 230(b)(2) of the Act, the Commission should seek to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[35] The Commission also recognized that ISP access requirements may violate the First Amendment rights of broadband service providers.[36] At a minimum, the First Amendment requires that the Commission avoid imposing discriminatory obligations that burden the speech of certain classes of broadband service providers more than others.

C. There Is No Need To Create a New Set of Rules To Replace the *Computer Inquiry* Requirements for Broadband Information Services.

The Commission has also requested comment on whether an alternative form of regulation should replace the *Computer Inquiry* regime in the context of wireline broadband information services. *See NPRM* ¶¶ 43-53. No such regime is necessary.

Although cable providers are currently dominant, the market for broadband Internet access is competitive, as the Commission itself has previously concluded.[37] The existence of such competition negates the need for regulation to prevent potential anti-competitive conduct. As explained above, SBC currently does business with hundreds of ISPs. It has no desire to discontinue those business relationships. To the contrary, SBC has every incentive to maximize the sale of its broadband services and the use of its network through relationships with unaffiliated information service providers. The absence of regulation will simply allow parties to structure their relationships in ways most responsive to market demand. In fact, is as evident

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Computer II regime as a response "to monumental changes in the technological and economic conditions of the communications marketplace"), *cert. denied*, 461 U.S. 938 (1983).

[35] *Cable Broadband Declaratory Ruling* ¶ 4.

[36] *Id.* ¶ 80.

[37] Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules*, 15 FCC Rcd 11857, 11867, ¶ 23 (2000).

from the Memorandum of Understanding between SBC and the USIIA, flexible commercial arrangements are in the interest of wireline broadband providers and ISPs.

ISPs themselves have recognized that the market – and, importantly, the existence of significant intermodal competition between competing broadband platforms – will permit them access on reasonable terms. The Memorandum of Understanding between SBC and the USIIA reflects that recognition. And Earthlink's President recently stated that the existence of "competing technologies" would "drive the prices down" for ISP access at the "wholesale level," resulting in lower consumer prices. *Earthlink Prices May Drop: Technology Rivalries a Factor*, Investor's Business Daily, Apr. 16, 2002, at A-8. Earthlink has also entered into arrangements to provide DSL- and satellite-based high-speed Internet access. Of course, to the extent that the Commission adopts new regulations – especially asymmetrical ones – this competition between technologies will be reduced, perversely harming the interests of both ISPs and consumers.

Moreover, long before the recent *Cable Broadband* decision, the Commission had determined that regulation of information services is unnecessary where a market is competitive. Thus, as long ago as *Computer I*, the Commission declined to regulate competitive information services, and instead properly left their development to the existing marketplace. [38] As the Commission concluded in its *Computer II* and *Computer III* proceedings, the decision to leave the computer processing industry free from Title II regulation, and subject only to the free give-and-take of the market place has led to "exponential growth" in the number of participants and products in that market.[39] "[C]ompetition, not regulation, holds the key to stimulating further

[38] Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I),* 28 F.C.C.2d 267 (1971) ("*Computer I*").
[39] *Computer II*, 77 FCC 2d at 433, ¶ 128; *see also* J. Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet* at 6, OPP Working Paper No. 31 (July 1999)

deployment of advanced telecommunications capability."[40] This reliance on the market to promote innovation and invention is even more important today, when, as SBC has already emphasized, competitors need to make huge investments to develop and deploy new technologies. Consumer demand, rather than regulatory fiat, should drive the allocation of investment resources.

Should the Commission determine that some regulatory requirements are necessary here, it should adopt very limited rules under Title I that apply across-the-board to all broadband providers. As SBC has already explained at length, a regulatory regime that applies only to a subset of secondary providers in a single, competitive market is indefensible as a matter of both law and policy. Such a regime gives artificial advantages to some providers, and undermines the incentive to make the risky investments necessary to expand competitive broadband access. It is thus directly contrary to Congress's clear direction in enacting section 706, and to this Commission's commitment to strive to create an analytical framework that is "consistent" across "multiple platforms." *NPRM* ¶ 6. An asymmetrical regime that ties regulatory freedom for BOCs to their performance in the separate market for traditional voice service, as reflected in section 271 authorizations or performance measures (*see id.* ¶ 48), would be even more arbitrary and unrelated to the goals of enhanced broadband access.

("The FCC has taken numerous steps since the early days of the telecommunications data services industry three decades ago to permit competitive forces, not government regulation, to drive the success of that industry. . . . [T]he success of the Internet today is, in part, a direct result of those policies.").

[40] *Second Advanced Services Report*, 15 FCC Rcd at 21004, ¶ 246; *see also* Memorandum Opinion and Order, *Amendments of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3035, 3061, ¶ 181 (1987) ("*Computer III Reconsideration Order*") (discussing "the benefits attainable through a highly competitive free market in enhanced services").

The bare minimum requirement for any "*Broadband I*" regime is thus symmetry across platforms. And, because the Commission has indicated its intent to excuse cable providers from Title II regulation, *see Cable Broadband Declaratory Ruling and NPRM* ¶ 95, a symmetrical regime would need to be adopted under Title I authority. *See id.* ¶¶ 75-77. An appropriate Title I regime would not only apply to all broadband platforms; it would also be minimally regulatory and tailored to the only legitimate regulatory concern here: ensuring that consumers have access to a sufficient choice of information service providers. Such a regime would simply require wireline providers to negotiate with unaffiliated information service providers to provide network access, without dictating the business structure of that arrangement or mandating any particular technical criteria. It would not mandate any particular form of access, and would expressly recognize the ability of providers to structure creative arrangements that allow for differentiation in business relationships based on volume, terms, points of connection, and other established market services.

D. The Commission Should Hold that the 1996 Act Resale and Unbundling Rules Do Not Apply to Wireline Broadband Facilities and Services.

The conclusion that wireline broadband does not involve a telecommunications service has a direct impact on ILEC obligations under section 251 of the 1996 Act.

As an initial matter, because an incumbent LEC does not offer a telecommunications service when it provides a broadband information service, incumbents have no obligation to offer that product for resale at a wholesale discount under section 251(b)(1) or 251(c)(4) of the Act.[41] The plain language of these provisions applies only to "telecommunications services."

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[41] *See* Memorandum Opinion and Order, *Application of Verizon New York Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, 14166, ¶ 42 n.93 (2001) (rejecting argument that "Verizon should make its bundled offerings that

Moreover, even if the Commission were to continue to require ILECs to offer the telecommunications component of that service to ISPs on a tariffed basis (which as discussed above, it should not do), the Commission has established that such an offering would be a wholesale service not subject to section 251(c)(4). *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999).

The unbundling requirements of section 251(c)(3) are similarly inapplicable. The plain language of the statute limits an incumbent LEC's unbundling obligations to facilities "used in the provision of a *telecommunications service*." 47 U.S.C. § 153(29) (emphasis added).[42] Because, as explained above, a broadband information service is not such a "telecommunications service," it necessarily follows that, at a minimum, unbundling obligations do not apply to facilities used by an incumbent LEC exclusively such services (*e.g.*, packet switches and associated transport, high frequency portion of the loop). By the same token, since requesting carriers are permitted to use network elements for the provision of a "telecommunications service," they may not obtain access to a UNE for the sole purpose of providing a broadband information service.

III. THE COMMISSION SHOULD PREEMPT STATE AND LOCAL REGULATION OF BROADBAND INTERNET ACCESS.

While the Commission has been taking steps to establish a uniform and coherent broadband policy, the states have been doing precisely the opposite. Flouting this Commission's efforts to create a national regulatory regime that is neutral with respect to competing

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include deregulated CPE and *internet access* available for resale. The resale obligation clearly extends only to telecommunications services offered at retail.") (emphasis added).

technologies, state commissions continue to impose disparate and onerous obligations on ILECs alone. Because the Commission will be unable to establish a coherent, deregulatory broadband policy so long as the states remain free to impose such intrusive and inconsistent regulatory burdens on incumbent telephone companies, the Commission must preempt state regulation of broadband services.

As recent actions by the state commissions of Connecticut, Indiana, Wisconsin, and California, among others, have proven, the states continue to attempt to place inappropriate and inconsistent requirements on the ILECs' wireline broadband services. The California Public Utilities Commission recently announced that it has jurisdiction over and intends to regulate provision of DSL transport service by SBC's affiliate.[43] The Wisconsin Public Service Commission has required Ameritech to provide an unbundled packet switched broadband service, and is currently requiring Ameritech's data affiliate to unbundle DSLAMs to a greater extent than is lawful under the *UNE Remand Order*.[44]

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[42] *See also* 47 U.S.C. § 251(c)(3) (outlining the duty to provide unbundled network elements "to any requesting telecommunications carrier *for the provision of a telecommunications service*") (emphasis added).

[43] Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss, *California ISP Ass' n v. Pacific Bell Tel. Co.*, No. 01-07-027 (Cal. Pub. Util. Comm'n rel. Mar. 28, 2002).

[44] Final Decision, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 116-17 (Wis. Pub. Serv. Comm'n rel. Mar. 22, 2002); Final Decision and Certificate, Docket No. 7825-T1-100, at 19-20 (Wis. Pub. Serv. Comm'n rel. Jan. 13, 2000) (remanded after judicial review for consideration of the necessary and impair criteria). The Texas PUC's Arbitrators have also required SBC to offer unbundled packet switching, and that decision is currently under review by the PUC. *See* Revised Arbitration Award, *Petition of Rhythms Links, Inc. Against Southwestern Bell Tel. Co. for Post-Interconnection Dispute Resolution under the Telecommunications Act of 1996 Regarding Rates, Terms, and Related Arrangements for Line Sharing*, Docket No. 22469 (Tex. Pub. Util. Comm'n rel. Sept. 21, 2001).

For its part, the Connecticut Department of Public Utility Control ("DPUC") has directed SBC to resell its Wholesale DSL Transport at a 25.4% discount off the wholesale price.[45] The DPUC's decision does not even bother to mention the Commission's tentative conclusions in this proceeding, even though SBC's affiliate repeatedly placed the *NPRM* squarely before that body. And the Indiana Utility Regulatory Commission ("IURC") has ruled that DSL Transport provided by the advanced services affiliate of Ameritech Indiana to its affiliated ISP is subject to OSS testing in Ameritech Indiana's section 271 proceeding.[46] The IURC also recently issued a ruling in another proceeding that compels Ameritech Indiana itself, through its existing interconnection agreement with a CLEC, to designate its advanced services affiliate, as a primary obligor under the interconnection agreement, to resell DSL Transport at a wholesale discount under 47 U.S.C. § 251(c)(4).[47] The Public Utilities Commission of Ohio ("PUCO") previously ruled that Ameritech/AADS must offer DSL transport at the resale discount. Upon rehearing, the PUCO issued an Entry on Rehearing revising its ruling, but still asserting jurisdiction over the service by requiring filings related to how the service is provisioned and the pricing methodology underlying the rates.

Legally, there can be no question that the Commission has the authority to preempt state regulation of broadband services. As the D.C. Circuit explained in affirming the Commission's *Computer II* decision, "Congress has empowered the Commission to adopt policies to deal with

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[45] Final Decision, *Petition of DSLnet Communications, LLC Regarding Section 251(c) Obligations of The Southern New England Telephone Company*, Docket No. 01-01-17 (Conn. Dep't Pub. Util. Control rel. Mar. 28, 2002).
[46] *Petition of Indiana Bell Tel. Co., Inc. d/b/a Ameritech Indiana*, Cause No. 41657-EDR-1 (Ind. U.R.C. June 27, 2001), *aff'd, Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 764 N.E.2d 734 (Ind. Ct. App. 2002), *petition for reh'g filed*.
[47] *Complaint of Midwest Telecom of America, Inc.*, Cause No. 41268-21RD01 (Ind. U.R.C. March 15, 2002) *appeal filed,* Case No. 93A02-0204-EX-306 (Ind. Ct. App.) *and complaint filed* No. IP 02-0606 C M/S (S.D. Ind.).

new developments in the communications industry." *Computer & Communications Industry Ass'n,* 693 F.2d at 217. And that authority includes the ability to preempt state regulation of interstate and jurisdictionally mixed enhanced services,[48] a category into which wireline broadband service clearly falls. As this Commission concluded in its *GTE ADSL Tariff Order*, "when xDSL transmission is used to provide Internet access services, these services are interstate, and thus, subject to Commission jurisdiction."[49]

"The purpose of Congress is the ultimate touchstone" of preemption law,[50] and here Congress's intention is clear. In section 706 of the 1996 Act, Congress directly instructed the Commission to use its regulatory jurisdiction to promote competition and to encourage deployment of broadband facilities.[51] Inconsistent and intrusive state regulation undermines each of these statutory goals. Congress additionally imposed explicit limits on state commission authority with respect to subjects addressed by the Act and the FCC's implementing regulations. Thus, section 261(c) provides that: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, *as long as the State's requirements are not inconsistent with this part or the Commission's regulations to*

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[48] *See California III*, 39 F.3d at 931-33; *NPRM* ¶ 62; *see also Computer & Communications Indus. Asd'n*, 693 F.2d at 206 ("For the federal program of deregulation to work, state regulation of CPE and enhanced services had to be circumscribed.").

[49] *NPRM* ¶ 62 (citing Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, 13 FCC Rcd 22466 (1998) ("*GTE ADSL Tariff Order*")).

[50] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990).

[51] Congress may choose to "take unto itself all regulatory authority over [the subject area], share the task with the States, or adopt as federal policy the state scheme of regulation. The question in each case is what the purpose of Congress was." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citation omitted).

implement this part." 47 U.S.C. § 261(c) (emphasis added). Once the Commission has concluded that broadband falls outside of section 251/252 framework, state commissions clearly cannot claim authority under section 251(c) to impose unbundling or resale requirements on incumbent provision of DSL transmission that are inconsistent with this Commission's clear rulings.

The Commission did not hesitate to use this preemptive authority in its *Computer II* and *Computer III* proceedings, and for good reason. Intrusive and inconsistent regulation by the states threatens "the efficient utilization and full exploitation of the interstate telecommunications network." *Computer III*, 104 F.C.C.2d at 1125, ¶ 343. Regulatory variation creates uncertainty, disruption, and delay, and interferes with the strong federal policy, codified in the 1996 Act, in favor of promoting widespread broadband deployment.[52] In light of the Commission's previous conclusion that broadband services are jurisdictionally interstate, there can be no question as to the scope of the Commission's authority to preempt state regulation that would effectively negate federal policy. *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("With regard to the matters addressed by the 1996 Act," Congress

[52] *See also Computer III*, 104 F.C.C.2d at 1127-28, ¶ 348 ("In this context, to permit application of inconsistent regulatory requirements to the provision of interstate and intrastate enhanced service offerings would be impracticable and would effectively negate federal policies."); *Computer III Reconsideration Order*, 2 FCC Rcd at 3061, ¶ 181 ("We decided [in *Computer II*] that preemption was warranted in light of the strong federal interests in efficiency and innovation that we found were achievable through competition in enhanced services offerings, but which were jeopardized by intrusive regulation."); Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3102, ¶ 208 (1980) ("*Computer III Phase II Order*") ("Because of the shared interstate and intrastate nature of the ITCs' underlying networks, which support the interstate basic services that may be offered with enhanced services, strong federal policies against imposition of structural separation on ITC provision of enhanced services, and in favor of the imposition of specific nonstructural safeguards, cannot coexist with conflicting state imposed regulatory requirements.").

"unquestionably" "has taken the regulation of local telecommunications competition away from the States").

Accordingly, the Commission has the power to preempt state regulation of broadband, and ample reason to exercise that authority. The Commission cannot establish a coherent national framework for regulating broadband if it allows the states to create their own patchwork of countervailing rules. State regulation is wholly incompatible with the goals of encouraging broadband deployment, promoting intermodal competition through policies that are neutral between competing platforms and technologies, establishing a minimal, deregulatory environment that promotes innovation, and developing an analytical consistency broadband policy. In short, state interference in the regulation of broadband is incompatible with each of guiding principles that the Commission articulated in the *NPRM* as well as the *Declaratory Ruling*. Unless the Commission acts decisively, state regulation threatens to undermine every step the Commission has proposed to take in establishing a national policy for broadband.

IV. THE COMMISSION'S RESOLUTION OF THE OTHER ISSUES PRESENTED HERE SHOULD BE CONSISTENT WITH THE PRINCIPLES OF PARITY AND MINIMAL REGULATION THAT IT HAS PROPERLY ESTABLISHED.

A. National Security and Law Enforcement

A decision that wireline broadband Internet access service is an information service should not affect the scope of the assistance that telecommunications carriers must offer to law enforcement under both CALEA and the USA PATRIOT Act of 2001.

As the Commission has made clear on several occasions, a "telecommunications carrier's" CALEA obligations are service-specific. Any entity that offers the transmission or switching of wire or electronic communications on a common carrier basis is a covered "telecommunications carrier" for purposes of CALEA, but only with respect to those services.

See Second Report and Order, *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105, 7111, ¶ 11 (1999). Just as an entity can be a common carrier with respect to some services but not others, so too can that entity be a "telecommunications carrier" under CALEA for only some offerings. *See id.* at 7116, ¶ 21 ("in any given case, the services an entity offers would determine its CALEA responsibilities").

Likewise, the Commission has made clear that any facilities jointly used for the provision of telecommunications and information services remain subject to CALEA. Because the local loop facilities that support DSL transport are typically utilized to provide voice service on a common carrier basis as well, those joint-use facilities must offer surveillance capabilities to law enforcement officials. Accordingly, nothing in the Commission's proposed decision would have any effect on law enforcement authority in the voice context.

Moreover, the Commission has already made clear that the 1996 Act did not alter the scope of the carriers or the services covered by CALEA. As the Commission explained:

> CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act, and the CALEA definitions therefore remain in force for purposes of CALEA. The pertinent sections of CALEA are not part of the Communications Act. Further, as we have previously noted, the 1996 Act expressly provides that it did not alter existing law by implication, and in the 1996 Act Congress did not repeal or even address the CALEA definitions. Although we expect in virtually all cases that the definitions of the two Acts will produce the same results, we conclude as a matter of law that the entities and services subject to CALEA must be based on the CALEA definition discussed above, independently of their classification for the separate purposes of the Communications Act.

Id. at 7112, ¶ 13. Accordingly, telecommunications carriers' CALEA obligations for voice will remain the same to the extent that they continue to provide common carrier voice services over the same facilities that they use to provide broadband services.

And while CALEA may not apply to data to the extent this Commission holds that it need not be provided on a common carrier basis, the government has ample statutory authority, enhanced by the USA PATRIOT Act, to conduct surveillance on the electronic communications and data transmission at the heart of broadband Internet access. Section 2703 of Title 18 allows government representatives to obtain access to subscriber information from any provider of "electronic communications," 18 U.S.C. § 2703, which is defined to include "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce," *id.* § 2510(12). This provision applies to Internet access provided over any broadband platform, regardless of the facilities involved. Accordingly, a Commission decision recognizing that broadband Internet access falls within the statutory definition of an information service will have no impact on the resources available to law enforcement officials.

If anything, the deregulation of wireline broadband services will promote national security by encouraging the development and deployment of redundant facilities and promoting network reliability. Policies that promote facilities investment and intermodal competition offer the best hope of ensuring the availability of back-up networks, so that an outage in one network cannot cripple the entire communications infrastructure. A regulatory regime that stifles investment in new, alternative facilities creates disincentives for incumbents and CLECs alike to fund network diversity and redundancy.

B. Consumer Protection, CPNI, and Related Issues

The Commission has also asked for comments on how classification of wireline broadband Internet access as an information service would affect existing consumer protections. *NPRM* ¶ 57. There will be no adverse impact on those protections.

While wireline Internet access service would not be subject to 47 U.S.C. § 214's discontinuance requirements, wireline providers would remain subject to the section 214 restrictions with respect to any telecommunications service that they continued to provide. Because the existing regulatory requirements for discontinuing service are minimal, and the applications are routinely granted, the impact of a decision classifying wireline broadband as a Title I service should not be a significant concern. Incumbent LECs are clearly non-dominant in the broadband market, as SBC has demonstrated in detail in other proceedings, so that any application to discontinue broadband service (if it were a Title II service) would automatically become effective after 31 days. *See* 47 C.F.R. § 63.71(c).

Classifying wireline broadband as an information service similarly will have little or no significant adverse effect on the application of the Commission's customer proprietary network information ("CPNI") rules. While the Commission has allowed the use of CPNI in marketing certain information services "considered necessary to, or used in, the provision of the underlying telecommunication service," including voice-mail and voice-storage, the Commission has consistently prohibited the use of CPNI to market Internet access services.[53] Accordingly, under the Commission's existing rules, a carrier cannot use CPNI to sell Internet access service.

Nor will there be any substantive effect on the Commission's truth in billing rules and guidelines. To the extent that a wireline broadband service provider additionally offers basic

[53] Order on Reconsideration and Petition for Forbearance, *Telecommunications' Carriers Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409, 14434, ¶¶ 45-46 (1999) ("*CPNI Order on Reconsideration*").

local service, that service provider will remain subject to the section 64.2400 truth in billing rules, and therefore must clearly and separately identify each incurred charge and any new service provider. Because the Commission has defined a "new service provider" as "a service provider that did not bill the subscriber for service during the service provider's last billing cycle," it covers information and telecommunications services. Accordingly, the Commission's rules will continue to protect consumers from fraud.

The Commission has also sought comment on its role in ensuring network reliability and interoperability of wireline broadband Internet access services. *NPRM* ¶ 56. As the Commission is aware, the Sixth Network Reliability and Interoperability Council ("NRIC") was recently established at the Commission's behest and charged with developing "recommendations for the Commission and the telecommunications industry to assure optimal reliability, security, interoperability, and interconnectivity of, and accessibility to, public telecommunications networks and the Internet."[54] Commission action in this proceeding will not constrain its ability to address generic interconnectivity and interoperability issues.

C. Universal Service

In light of the Commission's recognition that wireline broadband Internet access is an information service that is functionally identical to Internet access provided via cable, satellite, or wireless technologies, the Commission must alter its existing universal service rules to ensure that all broadband platforms can compete on a level playing field. The better approach, and the one that is more consistent with section 254 of the Act, is to require all providers of interstate telecommunications to contribute to the universal service fund. No particular technology or

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[54] QWEST Communications CEO Joseph Nacchio Assumes Chair Of Network Reliability and Interoperability Council, FCC News (Jan. 4, 2002) at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2002/nrmc0201.html (May 2, 2002).

category of providers should be saddled with a disproportionate share of universal service obligations.

Currently, a telecommunications carrier that provide an ISP with transmission service as an input for the ISP's Internet access service is assessed a universal service contribution and typically recovers that contribution from the ISP. An ISP that self-provisions transmission service — such as a cable operator that offers a bundled cable modem Internet access service — is not required to contribute to universal service, either directly or indirectly. SBC believes it is more appropriate to treat ISPs like IXCs, rather than end users, for universal service purposes and to assess contributions on ISPs regardless of facilities ownership.[55] An ISP may be a user of telecommunications services provided by an incumbent LEC on the one hand, but it also may own its own facilities and provide end users with interstate transport over a packet-switched network (*i.e.*, the public Internet). In order to maintain consistency with the contribution mechanism for traditional circuit-switched traffic, the Commission should require ISPs and other content providers to contribute to universal service based on the provision of interstate transport and/or broadband information access to an end user.[56]

Four years ago, the Commission recognized that, although ISPs themselves provide information services and not telecommunications services, the Commission has the authority to assess a universal service contribution based on the interstate telecommunications input underlying Internet services.[57]

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[55] For the same reason that a reseller of long distance service is required to contribute to universal service, an ISP that provides broadband information access and interstate transport services should be required to contribute, even if it does not own its own facilities.
[56] Although ISPs are treated as end users under the Commission's Enhanced Service Provider (ESP) exemption, the limited purpose in doing so was to ensure that they were not required to pay switched access charges for their interstate access.
[57] *Report to Congress*, 13 FCC Rcd at 11532, ¶ 66.

The Commission also recognized that it was appropriate to reexamine the disparity in its rules that requires telecommunications services providers that lease lines to ISPs to contribute to universal service, but does not require Internet service providers that own their own transmission facilities to contribute.[58] In particular, the Commission concluded that it might be advisable to exercise its discretionary authority under section 254 to treat the provision of transmission facilities to ISPs similarly, without regard to how those facilities are provided.[59] The Commission, however, was concerned that there were practical problems associated with determining the amount of an ISP's revenues that should be used to determine a universal service contribution. As a result, the Commission deferred action on the issue and has now raised it as part of this proceeding.[60]

The Commission should finally take action to eliminate the disparity in how universal service contributions are assessed on the telecommunications component of Internet services. Under the current rules, a wireline company such as SBC is required to contribute to universal service based on the transmission facilities used by any affiliated or non-affiliated ISP. A cable operator, by comparison, can avoid any universal service obligation for transmission facilities that it self-provisions as part of its own Internet service. This arbitrary distinction is solely the result of the Commission's requirement that wireline companies, but not competing broadband providers (e.g., cable, satellite and wireless), must offer the telecommunications component of Internet services on a stand-alone basis. In the broadband marketplace, the Commission's rules result in a 7 percent (or more) surcharge being applied to DSL service, but not to competing broadband services. Such a result is untenable in a competitive market, particularly when it is

[58] *Id*. at 11534, ¶ 69.
[59] *Id.*
[60] *Id.* at 11534-35, ¶¶ 69-70.

added to all of the other regulatory disadvantages that incumbent LECs must overcome to compete with deregulated providers of broadband services.

The Commission should not rely on facilities ownership as the basis for determining whether an ISP is the provider of interstate telecommunications because that creates a perverse incentive to avoid facility ownership in order to avoid a funding obligation when the Commission is expressly attempting to promote facilities-based competition. The Commission has noted that ISPs that lease transmission still make a contribution to universal service when they pay a recovery surcharge to the leasing carrier. However, a payment based only on transmission capacity leased from a telecommunications carrier may understate the level of interstate activity an ISP is actually engaged in, which shifts the funding obligation to other contributors. A more equitable way to assess an ISP's interstate activity for universal service funding purposes is to base it on the interstate data transport and/or information access the ISP makes available to its subscribers.

Moreover, the legislative history of section 254 does not support the Commission's use of facilities ownership as a way of determining whether an ISP is a *provider of telecommunications*. In the Senate Report describing the universal service provisions contained in the Senate Bill, the drafters noted that the Commission should be allowed to assess universal service contributions from providers, regardless of whether facilities are owned or leased.[61] The Senate also was concerned about bypass of the public switched network that would allowed certain types of service providers to avoid contributing to universal service when they provided substitutable functionality's. As is to be expected, technology has continued to evolve and a variety of

[61] S. Rep. No. 104-23, at 28 (1995).

substitutable services are now available, including interstate transport associated with IP telephony that bypass the public switched network.

Any practical concerns about requiring Internet service providers to contribute to universal service can and should be resolved directly. The Commission recently initiated a proceeding in which it is considering replacing the existing revenue-based contribution methodology with a flat-rated "per connection" methodology. This change eliminates any operational difficulties associated with assessing universal service contributions on ISPs that self-provision transmission facilities. In its comments, SBC presented its proposal (jointly developed with BellSouth) for a per-connection contribution methodology that is competitively and technology neutral. It assesses contributions based on the capacity of the connection to an access or interstate transport network, regardless of the type of service provided and the technology platform used by the service provider.

SBC's proposed contribution methodology is easy to administer and consistent with the principles that under no circumstances should universal service recovery charges effect an end user's selection of an interstate telecommunications provider. Rather, all providers of telecommunications, including common and private carriers, ISPs and other content providers, should contribute based on their interstate telecommunications activities. Regardless of the underlying technology or network facilities, each qualifying service connection between an end user and a retail provider should generate a universal service contribution. Moreover, these charges should be recovered through a uniform and transparent line-item charge readily identifiable by the end user customer.

As the Commission has recognized, section 254(d) of the Act clearly provides the Commission with the necessary legal authority to impose a pay-in mechanism that applies across-the-board. While the statute directs that all telecommunications carriers providing interstate telecommunications services "shall contribute, on an equitable and nondiscriminatory basis," it additionally gives the Commission the discretion to require "[a]ny other provider of *interstate telecommunications* . . . to contribute to the preservation and advancement of universal service if the public interest so requires." 47 U.S.C. § 254(d) (emphasis added). Because all broadband platforms necessarily include an interstate telecommunications component, *see Cable Broadband Declaratory Ruling* ¶ 40, the Commission can exercise its discretion to require all broadband providers to contribute on an equal basis. At a time when market developments are straining the universal service regime and undermining the regulatory distinctions long used to identify providers' universal service obligations, there can be no question but that the public interest requires the Commission to act.

CONCLUSION

For the foregoing reasons, the Commission should take a series of deregulatory steps in order to create a minimal regulatory environment for all broadband information services that will be conducive to investment and will bring enormous benefits to American consumers.

Respectfully submitted,

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